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Supreme Court of the United States

October Term, 1969

No. 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,

Plaintiffs-Appellants,

v.

LOWELL WADMOND, *et al.*,

Defendants-Appellees.

STEPHEN MARTIN WEXLER, *et al.*,

Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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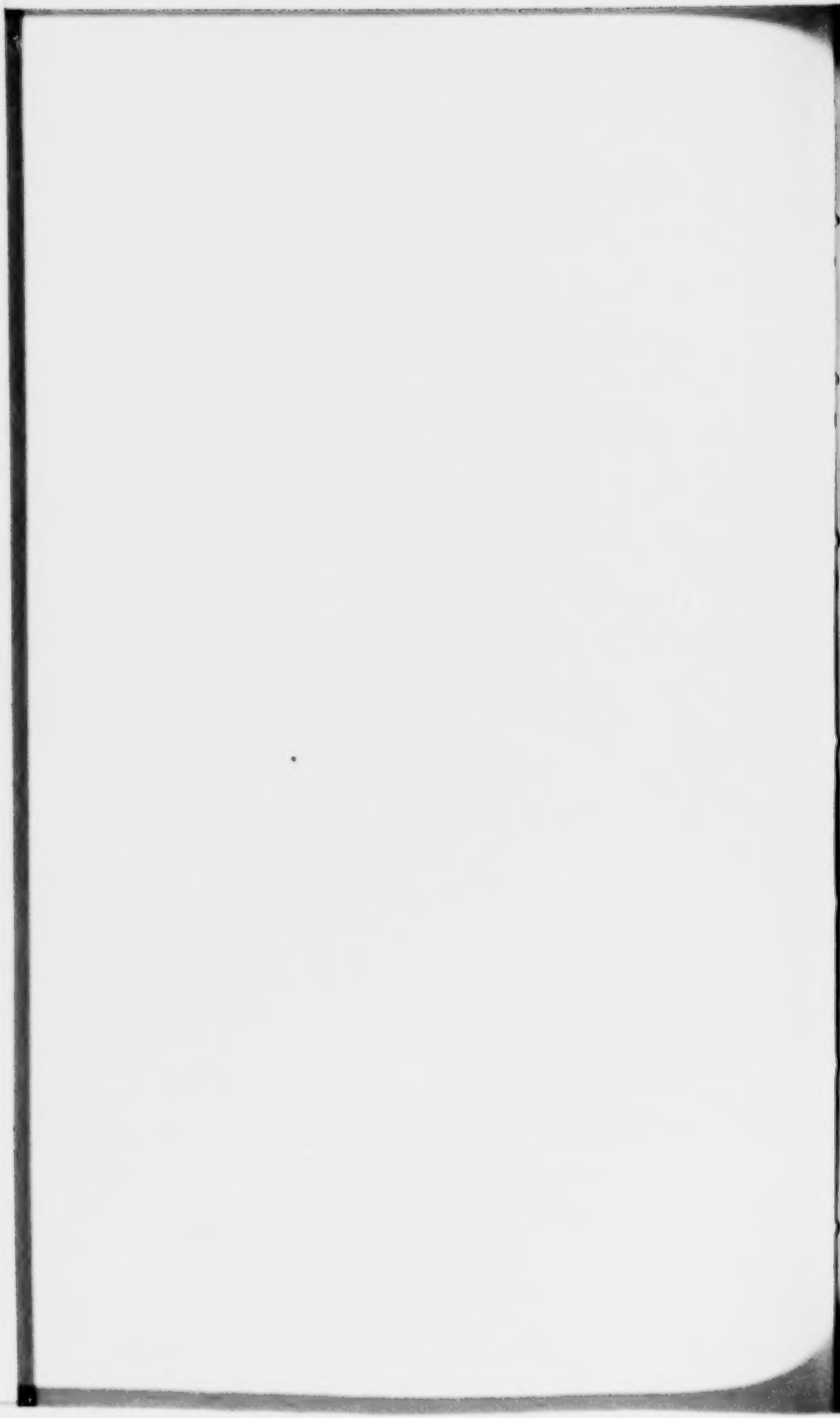

INDEX

	PAGE
Argument	1
Conclusion	12

Table of Authorities

CASES:

Baird v. State Board of Arizona, No. 53, O.T. 1969	1
Baggett v. Bullitt, 377 U.S. 360	3, 7
Barenblatt v. United States, 360 U.S. 109	3, 12
Bond v. Floyd, 385 U.S. 116	6
Cassidy, Application of, 268 App. Div. 282, 51 N.Y.S. 2d 202 (2d Dept. 1944), *aff'd without opinion* 296 N.Y. 926, 73 N.E. 2d 41 (1945-	7
Cramp v. Board of Public Instruction, 368 U.S. 278	7
Gibson v. Florida Legislative Committee, 372 U.S. 539	12
Girouard v. United States, 328 U.S. 61	7
Harrison v. NAACP, 360 U.S. 167	3, 4
NAACP v. Alabama, 357 U.S. 449	3, 12
NAACP v. Butten, 371 U.S. 415	3, 4
Rosenberg, Application of (1st Dept. 1968) (unreported)	10
Schiff, Application of, 163 N.Y.S. 2d 382 (1957)	8
Shuttlesworth v. Birmingham, 394 U.S. 147	4
Speiser v. Randall, 357 U.S. 513	8, 9, 11
Stamler v. Willis, 415 F. 2d 136 (7th Cir. 1969)	3
Stolar, In the Matter of the Application of, No. 75 O.T. 1969	1
Sweezy v. New Hampshire, 354 U.S. 234	3

CONSTITUTIONAL PROVISIONS:

First Amendment 2

NEW YORK STATUTES:

Civil Practice Law and Rules 9406 .....5, 6,

Judiciary Law § 90(1)(a) .....

Rule VIII of Rules of the New York Court of Appeals .....

MISCELLANEOUS:

Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480 (1953) ...

Note, *Inquiries into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 Columbia Survey of Human Rights 33 (1968)

The Proposed Anti-Communist Oath: New York City Association Votes Against Oath, 137 A.B.A.J. 124 (1951) .....

Weinstein, Korn, Miller, *New York Civil Practice*, (1968) 8, 10

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The substantiality of the issues raised in this case is evidenced by (i) this Court's pending review of somewhat similar problems in *Baird* v. *State Bar of Arizona*, No. 53, O.T. 1969 and *In the Matter of the Application of Stolar*, No. 75, O.T. 1969, (ii) the dissenting opinion of Judge Motley in the court below, and (iii) appellees' own arguments upon which we comment briefly.

I

Appellees concede, although somewhat equivocally, that the requirements of CPLR 9406(1) that an applicant "furnish satisfactory proof to the effect: (1) that he believes in the form of government of the United States and is loyal to such government" is unconstitutionally vague on its face (Mot. to Aff. p. 9).[1]

This concession was necessitated by the ruling below that the vagueness of an almost identically worded oath[2] appearing in the questionnaire and promulgated on the basis of CPLR 9406(1) deterred the free exercise of First Amendment rights by prospective applicants for admission to the New York Bar. See 33a-34a and discussion in Juris. State. pp. 16-17.

By conceding the vagueness of CPLR 9406(1) appellees necessarily acknowledge the absence of any legitimate statutory basis to sustains questions 26 and 27(a) as revised and question 27(b)[3] and the broad-ranging political

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[1] "Mot. to Aff." refers to the appellees' Motion to Affirm; "Juris. State." refers to appellants' Jurisdictional Statement; "a" refers to pagination of the appendix to the Jurisdictional Statement.

[2] This oath, set forth as Question 27(a) on appellees' questionnaire read as follows: "Do you believe in the principles underlying the form of government of the United States" See 32a.

[3] Question 26 as presently revised reads as follows:

"26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below. (b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the

nquiry which these questions initiate. For this Court has uled explicitly that the state "may not constitutionally equire an individual to disclose his political relationships nd other private affairs "where, as here, such disclosure erves no legitimate purpose." *Barenblatt* v. *United States,* 60 U.S. 109, 127; *NAACP* v. *Alabama,* 357 U.S. 449; *weezy* v. *New Hampshire,* 354 U.S. 234; see also *Stamler* . *Willis,* 415 F. 2d 1365 (7th Cir. 1969).

Appellees' argument that the vagueness of CPLR 406(1) is "eliminated by the interpretation of that Rule s implemented by the Committee in the questionnaire ubmitted to each applicant" (Mot. to Aff. p. 9) must fail or a number of reasons.

1. CPLR 9406(1) is so vague and ambiguous as not to e fairly or reasonably open to a limiting, plausible inter- retation. See *Harrison* v. *NAACP,* 360 U.S. 167, 176; *NAACP* v. *Button,* 371 U.S. 415, 433; *Baggett* v. *Bullitt,* 77 U.S. 360, 378.

2. Appellees' purported narrowing *but unspecified* in- erpretation derives solely from their own, current ques- ionnaire. This recently revised questionnaire, in use in but wo of New York's four judicial departments, is a plainly nsufficient basis upon which to define CPLR 9406(1), ssuming the statute to be susceptible of constitutional

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United States or any State of any political subdivision thereof by force, violence or any unlawful means?"

Question 27(a) as presently revised reads as follows:

"27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain."

Question 27(b) which was upheld in its original form provides:

"(b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?"

definition. This Court has required nothing less than a direct and "authoritative construction" by the state's highest court before entrusting the liberty of individuals to state authorities acting under an apparently vague statutory scheme. See *Harrison* v. *NAACP, supra,* at 138; *NAACP* v. *Button, supra,* at 432; *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 155.[4]

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[4] Appellees' "interpretation" of CPLR 9406(1) is far from the "authoritative construction" required by this Court. Not only is this "interpretation" not binding on the Appellate Divisions for the Third and Fourth Departments (see 15a,n. 1) but as the questionnaires for those departments demonstrate the scope of political inquiry authorized by CPLR 9406(1) is neither clearly defined nor a matter of consensus among the various Appellate Divisions.

Thus, the Third Department questionnaire contains the following political interrogatory: "17. Do you believe in the form of and are you loyal to the Government of the United States?"

This Court may take judicial notice (cf. *Shuttlesworth* v. *Birmingham, supra* at 157) of the Record in the *Stolar* case, *supra,* which includes a copy of the Fourth Department questionnaire, containing the following series of sweeping political inquiries (see the Appendix pp. 23a-24a filed in *In the Matter of the Application of Stolar, supra*):

> "17. State whether there are any favorable or unfavorable incidents in your life, whether at school, college, law school, business, or otherwise, not called for by the questions answered herein or disclosed in your answer thereto? If so, state the facts fully."
>
> "18. State whether you have participated in activities of a public or patriotic nature or in philanthropic, religious, or social services? If so, state the facts fully."
>
> "19. Do you believe in the principles underlying the form of government of the United States?"
>
> "20. State whether you have been or are a member of any party or organization engaged in propagating or pledged to effect changes in the form of government provided for by the United States Constitution, or in advancing the interests of a foreign country? If so, state the facts fully."
>
> "21. Can you conscientiously, and do you affirm, without any

3. Appellees offer no reason why the statute should be nstrued in the light of questions in existence for only six nths, and in disregard of questionnaires used for more n 20 years and of those employed by the Third and urth Departments. See *supra* p. 4, n. 4. Appellees have ther disavowed the validity of these long-standing prac-es, outlined in detail by Judge Motley (43a-54a), nor they give assurances that such practices will not be nstituted. The ephemeral nature of appellees' present nterpretation" is underscored by the conflicting "inter-etations" given CPLR 9406(1) by the various Appellate visions and by the varying formulations which have been vised to replace the oath originally contained in question (a) (see *supra* p. 2, n. 3) declared vague by the court ow. So appellees first offered, as a substitute, an oath worded as follows: "Do you believe in the constitutional rm of government of the United States?" See Juris. ate. p. 11, n. 12. This formulation, too, was rejected by court below. The question presently used is not the pellees' "interpretation" at all, but that of the court low, whose decision is being appealed.

4. Neither the questionnaire generally, which is de-gned solely to obtain information and not to erect a bstantive standard for admission, nor the specific politi- interrogatories, which are themselves under attack for gueness and overbreadth, purport to define the term orm of government", or what is meant by "believes in nd is loyal to such government'." Indeed, the Motion to firm conspicuously fails to discuss any interpretation of ese terms.

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mental reservation, that you have been and are loyal to the government of the United States?"

ne Clerk's office for the Fourth Department, has, by letter and ephone confirmed the fact that these questions are presently in use.

Judge Friendly's findings of "imprecision" with respect to the oath contained in question 27(a) apply with equal force to CPLR 9406(1) (33a-34a). For, as with the oath, there is no reason why applicants who oppose bicameral legislatures, the electoral college or the power of this Court to invalidate Congressional enactments or who are committed to the anarchist, monarchist or communist philosophies will not genuinely fear that their views may be deemed contrary to the belief and loyalty demanded by CPLR 9406(1).

II

CPLR 9406(1) cannot be shielded from the charge of overbreadth by arguing that it "constitutes merely a test of whether the applicant can subscribe in good faith to the constitutional oath of office" (Mot. to Aff. p. 9). See *Bond* v. *Floyd,* 385 U.S. 116; Juris. State. pp. 18-19; 76-78a.

While appellees do not define the "test", it is clear from the express findings in both the majority and dissenting opinions below that CPLR 9406(1) "goes to *belief* at the time of admission" (25a) in "the essentials, democratic government and change by lawful means" (33a) (emphasis added). See also, 26a, 68a. Such a test was correctly condemned by Judge Motley as irreconcilable with the "constitutional axiom 'that one be permitted to believe what he will'. *American Communications Assn.* v. *Douds,* 339, U.S. 382, 412, 70 S. Ct. 674, 691, 946 Ed. 925 (1950)" 68a. See alos *Girouard* v. *United States,* 328 U.S. 61, 68; Juris. State. pp. 17-18.

III

Appellees contend that the "good moral character and general fitness" standard set forth in Jud. L. § 90(1)(a) and Rule VIII (see text at 2a-4a) has been given "specific content and definition" in decisions by New York courts

(Mot. to Aff. p. 8) and is therefore not unconstitutionally vague.

This argument misses the point entirely. Appellants' challenge to the "good moral character and general fitness" standard focuses on its use as a qualification for political fitness. See *Application of Cassidy,* 268 App. Div. 282, 51 N.Y.S. 2d 202 (2d Dept. 1944), *aff'd without opinion* 296 N.Y. 926, 73 N.E. 2d 41 (1945); Brown & Fassett, *Loyalty Tests for Admission to the Bar,* 20 U. of Chi. L. Rev. 480, 496 (1953). Thus, the vagueness in this standard, about which this Court has raised serious questions in *Konigsberg* v. *State Bar,* 353 U.S. 252, 263, cannot be cured by reference to its application in a case involving dishonorable conduct, lack of candor or misrepresentations by an applicant. See Mot. to Aff. p. 8; see also 22a.

Like the statutes invalidated in *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, and *Baggett* v. *Bullitt, supra,* the "good moral character" standard, to the extent that it operates as a political test, creates a license for arbitrary and discriminatory denial of the right to practice law. Appellees' statement that the Committees "might . . . conclude"—the implication being apparent that the Committees do not recognize any obligation—that an applicant who answered question 26 affirmatively should not be denied admission absent a showing of imminent lawless action (Mot. to Aff., p. 10) illustrates the breadth of the power appellees have arrogated to themselves under this standard.

IV

Appellees argue that the requirement of CPLR 9406(1) that an applicant "shall furnish satisfactory proof" of his belief in and loyalty to the form of government of the United States does not unequivocally impose an unconstitutional burden of proof in violation of *Speiser* v. *Randall,*

357 U.S. 513. (Mot. to Aff. p. 9). The argument is untenable in view of the clear wording of the statute and the fact that as to subsections (2) - (4) of CPLR 9406, the phrase "shall furnish satisfactory proof" undeniably places the full burden of proof on the applicant with respect to the qualifications covered by those subsections. See Juris. State. pp. 20-21; 2a, 69a; see also *Application of Schiff*, 163 N.Y.S. 2d 382 (1957); *Application of Kerno*, 1 A.D. 2d 972, 151 N.Y.S. 2d 29 (1956).

Furthermore, appellees' formulation of the "burden" imposed by CPLR 9406(1) as "merely one of initially coming forward with some evidence" (Mot. to Aff. p. 9) is unreal.

First, there is no support for this nebulous construction in decisions of the New York courts or in the views of commentators on the subject. This statute, first enacted in 1921, has always been viewed as an unqualified requirement that the applicant bear the burden of proving his loyalty. See *The Proposed Anti-Communist Oath: New York City Association Votes Against Oath*, 137 A.B.A.J. 124 (1951); Weinstein, Korn, Miller, *New York Civil Practice*, ¶9404.05 (1968).

Second, appellees' failure to elucidate the meaning of the "some evidence" standard and that standard's obvious susceptibility to uneven application in practice raise serious questions of vagueness.

But even assuming that "some evidence" can be equated with a "prima facie case", the requirement still runs afoul of *Speiser* v. *Randall, supra.* Under the reasoning of *Speiser,* there is no rational distinction between compelling an applicant to prove his loyalty, prima facie, a showing which may then be rebutted by the Committee, and to prove his loyalty ultimately. Cf. *Konigsberg* v. *State Bar,* 366 U.S. 36, 40-41 no. 4. No matter how the burden is characterized, the pressures on the law student or applicant to "steer far wider of the unlawful zone" (*Speiser* v.

Randall, supra at 527) are overpowering. That is because he understands that the men before whom he must bring forth "satisfactory proof" of the morality and lawfulness of his political associations and beliefs are men who have his professional reputation and career in their hands and who are very likely to be out of touch with, if not hostile to, contemporary political and social movements. See dissenting views of Justice Traynor in *Konigsberg* v. *State Bar*, 52 Cal. 2d 769, 776, 344 P. 2d 777, 780, 782 (Cal. S. Ct. 1960).

Judge Motley accurately pointed to the burden of proof requirements as the "heart" of the case (70a). This requirement provides the mechanism for appellees' practice of selectively intensifying the political interrogation for those applicants whose political associations and beliefs do not conform to appellees' standard of orthodoxy.[5] Thus, appellees may fasten upon a controversial association or belief disclosed by the applicant or discovered by the Committee's independent investigation as the basis for a find-

[5] Appellees cannot avoid scrutiny of their practices by arguing that the only evidence of these practices was "contested allegations of the complaints". (Mot. to Aff. p. 7). In fact, as Judge Motley points out, "[o]nly a general denial of these allegations has been made in the answers filed by defendants and no other denial of the validity of these allegations has been presented." (54a-a5a).

Moreover, the charge that these practices exist was made in the affidavit submitted by appellants in support of their motion for summary judgment (R. Doc. No. 17); appellees did not offer controverting evidence in their opposing affidavit. (*Ibid.*)

Finally, the practices of the appellees are a matter of common knowledge. See Brown & Fassett, *supra* at 493-494.. The leading commentators on the CPLR have stated that in determining whether an applicant has established his loyalty under CPLR 9406(1) the "applicant may be questioned about his affiliations with any group which might be considered subversive. He must reveal fully his views and past associations." Weinstein, Korn, Miller, *supra* at ¶ 9406.03. Thus, the court below readily presumed the existence of the practices appellants alleged (38a-39a).

ing that the applicant has not *yet* met his burden.[6] As a consequence of such a finding, the applicant is compelled to explain in detail and fully justify these assocations or beliefs in an attempt to exorcise any doubts engendered in the Committee regarding his political fitness. See Weinstein, Korn, Miller, *supra* at ¶ 9406.03. This procedure, with its potential for arbitrary suppression of political liberties, prompted Judge Motley's conclusions that "[t]he burden of proving loyalty here, as in *Speiser*, can have but one effect on a prospective lawyer's First Amendment freedoms; and that is a chilling effect if not a freezing one." (71a, see also 72a).

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[6] Two recent cases provide a striking illustration of appellant's discriminatory application of the burden of proof requirement.

One involved the appellant Kaimowitz, who submitted his application for admission after the court below rendered its decision. On June 13, 1969 the Committee for the Second Department refused to certify appellant's admission and ordered a further investigation. The basis for its determination was questions raised by (i) appellant's joining several other writers in a strike against their employer, Television Age Magazine, because of differences on editorial policies; (ii) appellants' participation with other summer instructors employed by the Southern Teaching Program sponsored by Yale University in an on-campus, peaceful assembly to protest the educational policies of Bishop College, an all black institution located near Dallas, Texas, to which they were assigned; and (iii) appellants' objection to Canon 16 of the now superseded Canons of Ethics because it required an attorney to terminate his relationship with a client who persists in courtroom misconduct in violation of the Sixh Amendment. Finally, on December 18, 1969, Kaimowitz was admitted by the Appellate Division over the Committee's adverse recommendation.

The second case involved an applicant who was denied a certificate of admission by the Committee for the First Department and ordered to submit to further investigation as a result of a personal interview in which the applicant's disclosure of his participation in anti-war marches prompted the Committee to compel him to state the reasons for his opposition to the war in Vietnam. After a three-month delay, the applicant was admitted. See *Application of Rosenberg* (1st Dept. 1968) (unreported). This case is discussed in Note, *Inquiries Into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 Columbia Survey of Human Rights, 33, 38 n. 27a (1968).

V

Appellees suggest that in reviewing the breadth of the political and personal investigation authorized by New York's statutory-judicial scheme, this Court should ignore appellees' past, long-standing practices. Nevertheless, appellees refuse to admit that these practices, only recently curtailed (see Juris. State. p. 26, n. 27), were unauthorized or constitutionally invalid and will not be reinstituted in the future. Nor have appellees limited the scope of inquiry involved in the oral interviews. See *supra*, p. 10, n. 6. Accordingly, the statutory-judicial scheme must be read as authorizing the sweeping political and personal investigations appelles have conducted for at least the last 20 years, and is therefore violative of the constitutional requirement of precision (see Juris. State. pp. 30-31).

Even assuming this past history of statutory application did not exist, appellees' rationale for their present practices [questions 26, and 27(a) and (b)] is constitutionally insufficient. According to appellees, applicants are compelled to answer questions 26 and 27(a) and (b) merely "[i]n order to avoid the difficulty of having one individual demur to the taking of . . . [the Constitutional] oath at the very moment prior to admission." (Mot. to Aff. p. 10). Thus, questions 26 and 27(a) and (b) must be held to be invalid under the rulings of this Court prohibiting regulation in the area of First Amendment freedoms in the absence of a compelling or subordinating state purpose. See *Barenblatt* v. *United States, supra; NAACP* v. *Alabama, supra; Gibson* v. *Florida Legislative Committee*, 372 U.S. 539. The interests of appellees' convenience and of the smooth running of their ceremony are hardly sufficient justification for the interference with appellants' freedom of belief and association.

CONCLUSION

The Motion to Affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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